99TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
99-506

APPEAL RIGHTS FOR CERTAIN FEDERAL EMPLOYEES IN THE EXCEPTED SERVICE

MARCH 25, 1986.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mrs. SCHROEDER, from the Committee on Post Office and Civil Service, submitted the following

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REPORT

[To accompany H.R. 917]

[Including cost estimate of the Congressional Budget Office]

The Committee on Post Office and Civil Service, to whom was referred the bill (H.R. 917) to amend title 5, United States Code, to extend to certain employees in the excepted service the same procedural and appeal rights as are afforded to employees in the competitive service with respect to certain adverse personnel actions, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That (a) section 7511 of title 5, United States Code, is amended to read as follows:

"§7511. Definitions; application

"(a) For purposes of this subchapter—

"(1) 'employee' means—

"(A) an individual in the competitive service—

"(i) who is not serving a probationary or trial period under an initial appointment; or

"(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

"(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

"(i) in an Executive agency; or

"(ii) in the United States Postal Service or the Postal Rate Commission; and

"(C) an individual in the excepted service (other than a preference eligible) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency;

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41.1/8:

"(2) 'suspension' has the same meaning as set forth in section 7501(2) of this title;

"(3) 'grade' means a level of classification under a position classification system;

"(4) 'pay' means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

"(5) 'furlough' means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

"(b) This subchapter does not apply to an employee—

"(1) whose appointment is made by and with the advice and consent of the Senate;

"(2) whose position has been determined to be of a confidential, policy-determining, policy/making or policy-advocating character by—

"(A) the President for a position that the President has excepted from the competitive service;

"(B) the Office of Personnel Management for a position that the Office as excepted from the competitive service; or

"(C) the President or the head of an agency for a position excepted from the competitive service by statute;

"(3) whose appointment is made by the President;

"(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund;

"(5) who is described in section 8337(h)(1) of this title, relating to technicians in the National Guard;

"(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;

"(7) whose position is within the Central Intelligence Agency, the General Accounting Office, or the Department of Medicine and Surgery, Veterans' Administration; or

"(8) whose position is within the United States Postal Service, the Postal Rate Commission, the Federal Bureau of Investigation, or the National Security Agency, except as provided in subsection (a)(1)(B) of this section.

"(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.".

"(b)(1) This Act shall become effective on the ninetieth day after the date of the enactment of this Act, and shall apply with respect to any personnel action taking effect on or after such day.

(2) No appeal or other proceeding in the nature of review lawfully commenced before the effective date of this Act shall abate by reason of the enactment of this Act. Determinations with respect to any such appeal or proceeding shall be made as if this act had not been enacted.

Explanation of Amendment

The committee amendment to H.R. 917 strikes out all after the enacting clause and substitutes an entirely new text. The explanation of the provisions of the committee amendment is contained in the explanation of the bill set forth later in this report.

Purpose

The purpose of this legislation is to extend to certain employees in the excepted service who are not preference eligibles the same administrative notice and appeal procedures currently provided employees in the competitive service and preference eligible employees in the excepted service.

Committee Action

On February 4, 1985, Representative Mervyn Dymally introduced H.R. 917, a bill to provide administrative due process for certain

excepted service employees in adverse action cases. H.R. 917 was referred to the Committee on Post Office and Civil Service.

The Subcommittee on Civil Service held a hearing on H.R. 917 on June 19, 1985 (Serial No. 99-29). Testimony was presented by the Hon. Mervyn Dymally (D-CA); Llewellyn M. Fischer, associate general counsel, U.S. Office of Personnel Management; Paul Newton, director of legislation, National Treasury Employees Union; Judith Rivlin, immediate past president, National Labor Relations Board Professional Association; and Joseph E. Ross, president, Federal Bar Association, accompanied by the Hon. Marvin Morse, Chief Administrative Law Judge, Small Business Administration.

Testimony was also received from Bun B. Bray, Jr., executive director, Federal Managers Association, accompanied by Catherine Ball, legislative counsel; G. Jerry Shaw, general counsel, Senior Executives Association; John T. Hunter, president, Association of Civilian Technicians; Clint Wolcott, staff attorney, National Federation of Federal Employees; and Edward Murphy, legislative counsel, National Association of Government Employees.

Written statements were received from the Hon. Jim Bates (D-CA); Kenneth T. Blaylock, national president, American Federation of Government Employees; Robert L. White, president, National Alliance of Postal and Federal Employees; and Jay P. Sanford, M.D., president and dean, Uniformed Services University of the Health Sciences.

On March 4, 1986, the Subcommittee on Civil Service adopted an amendment in the nature of a substitute to H.R. 917 offered by Chairwoman Schroeder, and approved the bill, as amended, by a record vote of 4-0.

On March 12, 1986, the Committee on Post Office and Civil Service ordered H.R. 917, as amended, favorably reported by voice vote, a quorum being present.

H.R. 917, as amended, amends section 7511 of title 5, United States Code, to clarify the existing provision and to extend that section's procedural protections to certain employees in the excepted service who have completed two years of current continuous service in an Executive agency. H.R. 917, as amended, extends rights to most employees in the excepted service who have completed 2 years of service, but specifically excludes the following groups of employees from coverage: (1) presidential appointees; (2) certain reemployed annuitants; (3) National Guard technicians; (4) members of the Foreign Service; (5) employees of the Central Intelligence Agency, the General Accounting Office, and the Department of Medicine and Surgery of the Veterans Administration; and (6) employees, other than preference eligibles, of the U.S. Postal Service, the Postal Rate Commission, the Federal Bureau of Investigation, and the National Security Agency.

STATEMENT

The Pendleton Act of 1883, which serves as the foundation of the current civil service system, set out three principles: that competitive examination be used to determine fitness of applicants, that civil servants be politically neutral, and that civil servants have

relatively secure tenure. According to the U.S. Office of Personnel Management, 57 percent of Federal workers were in competitive service positions as of September 1985.

The rest of the Federal work force, nearly 1.2 million employees, are in excepted service positions. Of these, 750,000 are employed by the U.S. Postal Service, and about 115,000 work in the Department of Medicine and Surgery of the Veterans Administration. These employees are not covered under H.R. 917. An estimated 30 percent to 40 percent of the remaining 335,000 employees already have appeal rights because they are veterans' preference eligibles. In some agencies, such as the Central Intelligence Agency and the General Accounting Office, even veterans do not have appeal rights, and H.R. 917 will not grant any new rights. Of the remaining 200,000 employees some are political appointees and some are temporary workers (neither of which are covered by the legislation). The balance are attorneys, physicians, chaplains, and scientists to whom this bill applies.

The fact that an employee is not in the competitive service does not mean that the employee can be hired or fired at whim. As any attorney who has tried to get a job at the Department of Justice knows, hiring is extremely competitive.

Nor can employees in excepted service positions be fired without notice. The requirements of constitutional due process and numerous agency grievance procedures usually require that excepted service employees have notice and an opportunity to defend themselves before removal.

The key difference between the protections available to competitive service employees and veterans' preference eligibles in the excepted service, on the one hand, and excepted service employees who are not preference eligibles, on the other, is the right to appeal an adverse action to the Merit Systems Protection Board for independent review. H.R. 917 eliminates that difference.

The Veterans' Preference Act of 1944 provided veterans in expected service positions with the same appeal rights as employees in the competitive service. As a result, in some agencies wholly expected from the competitive service nearly half of the employees are entitled to procedural protections.

The committee is aware of no problems which have occurred because of the procedural protections of the Veterans' Preference Act of 1944. Permitting veterans in excepted service positions to appeal to the Merit Systems Protection Board when they face adverse actions has not crippled the ability of agencies excepted from the competitive service to function. Therefore, the committee sees no problem with extending these procedural protections to certain other employees in the excepted service.

The procedural protections provided by this legislation to certain excepted service employees are spelled out in chapter 75 of title 5, United States Code. In cases involving removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less, the employee must be given 30 days advance written notice of the proposed action, an opportunity to respond in writing, a written decision containing specific reasons for the adverse action, and an appeal to the Merit Systems Protection Board.

The Office of Personnel Management has argued that since these excepted service employees are not competitively hired, they should not be given due process rights in removal actions. The committee is not persuaded. First, it is not true that expected service employees are not competitively selected. While the centralized, examination-based hiring procedures which apply to the competitive service are not applicable to the excepted service, getting a job as a Government lawyer can be quite a competitive process. On the other hand, no matter how an employee is initially hired, that employee acquires certain expectations about continued employment with the Government. Excepted service employees feel no less secure in their positions than competitive service employees. They should have the same right to be free from arbitrary removal as do competitive service employees. To ensure that excepted service employees have an expectation of continuing employment with the Federal Government before any procedural rights attach, the bill provides that excepted service employees who are not preference eligibles must serve two years prior to gaining procedural rights.

The excepted service consists of the following categories of employees and of certain agencies excepted from the competitive service requirements by statute:

Schedule A, positions other than those of a confidential or policy-determining character for which it is impracticable to examine. Employees in Schedule A positions include attorneys, chaplains, scientists, as well as presidential appointees and temporary and intermittent workers. The bill generally extends procedural rights to attorneys, chaplains, and scientists, but not to presidential appointees. The requirements that an employee have served two current continuous years before becoming eligible for the notice and appeal rights will keep temporary employees from clogging up the Merit Systems Protection Board appeals system. Again, the key to the distinction between those to whom appeal rights are extended and those to whom such rights are not extended is the expectation of continuing employment with the Federal Government. Lawyer, chaplains and scientists have such expectations; presidential appointees and temporary workers do not.

Schedule B, positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination. Students and individuals with certain handicapping conditions may be appointed to schedule B positions. Also in Schedule B are entry-level (GS–5 and GS–7) professional and administrative positions which have been filled through the use of Schedule B authority in the last few years because the consent decree in *Luevano* v. *Devine* abolished the Professional and Administrative Career Examination (PACE), which used to be the vehicle for filling these positions. These employees were granted notice and appeal rights by regulation of the Office of Personnel Management.

Schedule C, positions of a confidential or policy-determining character. These are political appointees who are specifically excluded from coverage under section 7511(b) of title 5. H.R. 917 does not change the fact that these individuals do not have appeal rights.

The bill explicitly denies procedural protections to presidential appointees, individuals in Schedule C positions, and individuals appointed by the President and confirmed by the Senate. Employees in each of these categories have little expectation of continuing employment beyond the administration during which they were appointed. They explicitly serve at the pleasure of the President or presidential appointee who appointed them.

The bill explicitly exludes retirees receiving annuities from the Civil Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund. Section 3323 of title 5, United States Code, states that reemployed annuitants serve at the will of the appointing authority.

The bill excludes National Guard technicians. While the committee is sympathetic to the pleas for better protection the technicians made at hearings, the committee also recognizes that it shares jurisdiction over these individuals, who are hired under the provisions of title 32, United States Code, with the Committee on Armed Services. Rather than delay this legislation to work out legislation acceptable to the Committee on Armed Services, the committee will address the issue of protection for technicians in separate legislation.

The bill excludes members of the Foreign Service because the Foreign Service Act of 1980 provides comparable procedural protections through the Grievance Board mechanism.

The bill excludes all employees of the Central Intelligence Agency, the General Accounting Office, and the Department of Medicine and Surgery of the Veterans Administration. In each case, a separate statute excludes the employees of these agencies from the normal appeals process. The National Security Act of 1946 provides the Director of Central Intelligence with plenary authority to deal with the personnel of the CIA. The General Accounting Office Personnel Act of 1980 provides comparable procedural rights to GAO employees through the GAO Personnel Appeals Board. The employees of the Office of Medicine and Surgery of the Veterans Administration are subject to a special peer review system.

The bill limits procedural protections for employees of the Postal Service, the Postal Rate Commission, the Federal Bureau of Investigation (FBI), and the National Security Agency (NSA) soley to preference eligibles, thereby preserving the status quo. Nonbargaining unit employees of the Postal Service are dealt with in another bill (H.R. 2854). The committee preserved the status quo in relation to the FBI and NSA because of their sensitive missions.

Section Analysis

Subsection (a) of the bill amends section 7511 of title 5, United States Code, as explained below.

Section 7511(a), as amended by the bill, defines "employee" as (A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less; (B) a preference eligible in the excepted service who has completed 1 year of cur-

rent continuous service in the same or similar positions in an Executive agency or in the U.S. Postal Service or the Postal Rate Commission; and (C) an individual in the excepted service (other than a preference eligible) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency. The requirement of 2 years' service is intended to exclude temporary or intermittent workers from coverage.

Section 7511(a)(2) through (5) restate existing law.

Subsection (a)(2) defines "suspension" as the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay, as set forth in section 7501(2) of title 5.

Subsection (a)(3) defines "grade" as a level of classification under a position classification system.

Subsection (a)(4) defines "pay" as the rate of basic pay fixed by law or administrative action for the position held by an employee.

Subsection (a)(5) defines "furlough" as placing an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

Section 7511(b), as amended by the bill, lists those employees who are not covered by the adverse action procedural protections in subchapter II of chapter 75 of title 5, United States Code.

Subsection (b)(1), (b)(2)(B), and (b)(2)(C) restate existing law. Subsection (b)(1) excludes an employee whose appointment is made by and with the advice and consent of the Senate.

Subsection (b)(2) excludes an employee whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character and has been excepted from the competitive service by (A) the President; (B) the Office of Personnel Management; or (C) by statute.

Subsection (b)(3) excludes an employee who is appointed by the President (currently excluded by regulation).

Subsection (b)(4) excludes an employee who is receiving an annuity from the Civil Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund.

Subsection (b)(5) excludes National Guard technicians. This is consistent with section 709(f) of title 32, United States Code, which states that sections 7511 and 7512 of title 5 do not apply to National Guard technicians.

Subsection (b)(6) excludes members of the Foreign Service. Chapter 11 of the Foreign Service Act of 1980 (P.L. 96–465) established a grievance procedure for members of the Foreign Service.

Subsection (b)(7) excludes employees of the Central Intelligence Agency; the General Accounting Office; or the Department of Medicine and Surgery, Veterans' Administration.

Subsection (b)(8) excludes employees who are not preference eligibles in the following agencies: the U.S. Postal Service; the Postal Rate Commission; the Federal Bureau of Investigation; and the National Security Agency. Preference eligible employees of these agencies will continue to have notice and appeal rights.

Section 7511(c) authorizes the Office of Personnel Management to provide the procedural protections of subchapter II of chapter 75 to any group of employees which the Office has excepted from the competitive service by regulation. This is identical to existing section 7511(c). The Office of Personnel Management has used this au-

thority to extend adverse action protection to Schedule B employees in professional and administrative career positions. However, OPM has not used this authority to extend coverage to Federal attorneys.

Subsection (b)(1) of the bill, as amended, provides that the Act shall take effect on the ninetieth day after the date of enactment and shall apply to any personnel action taking effect on or after that day.

Subsection (b)(2) provides that the Act will have no effect on any appeal or other review proceeding lawfully commenced before the effective date.

COST

The cost estimate prepared by the Congressional Budget Office pursuant to section 403 of the Congressional Budget Act of 1974 is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 25, 1986.

Hon. WILLIAM D. FORD,
Chairman, Committee on Post Office and Civil Service, U.S. House of Representatives, 309 Cannon House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 917, a bill to amend title 5, United States Code, to extend to certain employees in the excepted service the same procedural and appeal rights as are afforded to employees in the competitive service with respect to certain adverse personnel actions, as ordered reported by the House Committee on Post Office and Civil Service, March 12, 1986. We estimate that this bill would cost about $1.6 million in 1987, increasing to about $2 million by 1991.

The bill would increase by about 150,000 the number of Executive Branch employees eligible to appeal adverse actions to the Merit Systems Protection Board (MSPB). Under current law, most veterans' preference eligibles and employees in the competitive service can appeal adverse actions to the MSPB, which makes about 9,700 decisions annually. Assuming the same proportion of excepted service employees appeal to the MSPB as competitive service employees, enactment of this bill would require the MSPB to make an additional 800–900 decisions per year, resulting in additional costs of about $1.1 million in 1987, gradually rising to about $1.4 million in 1991.

Extending appeal rights would also result in federal agencies having to award back pay to excepted service personnel who are successful in their appeals. Based on experience with the appeals of Postal Service employees, we estimate that back pay for employees affected by this bill is likely to be about $0.5 million per year. Other costs associated with defending agencies' actions during MSPB appeals are not expected to be significant.

No costs would be incurred by state or local governments as a result of this bill.

If you wish further details on this estimate, we will pleased to provide them.

With best wishes,
Sincerely,

JAMES BLUM
(For Rudolph G. Penner, Director).

OVERSIGHT

Under the rules of the Committee on Post Office and Civil Service, the Subcommittee on Civil Service is vested with legislative and oversight jurisdiction over the subject matter of this legislation. As a result of the hearings, the subcommittee concluded that there is ample justification for enacting this legislation.

The subcommittee received no report of oversight findings or recommendations from the Committee on Government Operations pursuant to clause 4(c)(2) of House Rule X.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of House Rule XI, the committee has concluded that the enactment of H.R. 917 will have no inflationary impact on the national economy.

ADMINISTRATION VIEWS

Set forth below are the views of the Office of Personnel Management and the General Accounting Office on this legislation.

U.S. OFFICE OF PERSONNEL MANAGEMENT,
Washington, DC, June 25, 1985.

Hon. WILLIAM D. FORD,
Chairman, Post Office and Civil Service Committee, U.S. House of Representatives, Washington, DC.

DEAR MR. FORD: Thank you for asking the United States Office of Personnel Management (OPM) to testify on H.R. 917, a bill "To amend title 5, United States Code, to extend to certain employees in the excepted service the same procedural and appeal rights as are afforded to employees in the competitive service with respect to certain adverse actions."

OPM objects to this proposed legislation on three fundamental grounds. First, Congress faced this issued during the intensive scrutiny of the Federal civil service which led up to the Civil Service Reform Act of 1978. At that time, Congress had the opportunity to extend adverse action appeal rights to excepted service personnel, but Congress chose not to do so. Instead, under 5 U.S.C. § 7511(c), OPM was authorized to promulgate regulations providing adverse action procedures and appeal rights to any position or group of positions excepted from the competitive service. Under 5 U.S.C. § 4303, however, the rights of appeal conferred upon persons who are removed or reduced in grade for unacceptable performance specifically do not apply to excepted service employees who are not otherwise entitled to appeal rights by virtue of veterans preference.

Second, it is our view that the adverse action appeal rights enjoyed by employees in the competitive service have been earned by attaining their positions through the competitive examining process administered by OPM. This process includes as its final step a probationary period, during which employees may be removed

without undue formality. Excepted service employees have not undergone the rigorous screening which OPM has designed to ensure a person's ability to perform in a particular position. Without having passed this "test", they should not be afforded the means to encumber their removal if their performance fails to meet required standards.

Third, excepted service personnel already have several legitimate avenues available to them to protect themselves from unwarranted adverse actions. Employees entitled to veterans' preference have the same adverse action rights as do their colleagues in the competitive service. Excepted service employees who believe an adverse action taken against them was based on a prohibited form of discrimination may utilize the equal employment opportunity process, up to and including an appeal to the Equal Employment Opportunity Commission. The Special Counsel will protect an employee who is the victim of a prohibited personnel practice, regardless of whether or not the emplopyee is in the excepted service or the competitive service. Finally, an employee without appeal rights, who asserts a constitutional claim with respect to an adverse action taken against him, may file a lawsuit in the courts of the United States.

The extension of appeal rights to Federal employees in the excepted service is an important issue worthy of careful consideration. We hope these remarks have given you the basis for OPM's opposition to such a measure.

The Office of Management and Budget advises that from the standpoint of the President's program, there is no objection to the submission of this report.

Sincerely,

LORETTA CORNELIUS,
Acting Director.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, DC, June 12, 1985.

B-167710.

Hon. WILLIAM D. FORD,
Chairman, Committee on Post Office and Civil Service, House of Representatives.

DEAR MR. CHAIRMAN: I would like to comment on one aspect of H.R. 917 which was introduced on February 4, 1985, and referred to the Committee on Post Office and Civil Service. The bill would amend title 5, United States Code, to extend to employees in executive agencies who occupy positions in the excepted service the same procedural and appeal rights granted to employees in the competitive service by chapter 75, title 5, United States Code.

My concern is that the language contained in the bill would extend to General Accounting Office employees, all of whom occupy positions in the excepted service, the right to appeal covered actions to the Merit Systems Protection Board. (This is because GAO is an executive agency as that term is defined at 5 U.S.C. § 105.) Such a result would be contrary to the purpose of the General Accounting Office Personnel Act of 1980, Pub. Law No. 96-

191, Feb. 15, 1980, 94 Stat. 27. That Act authorized the Comptroller General to establish a personnel management system that would, among other things, provide for the taking of personnel actions consistent with chapter 75 of title 5, United States Code. 31 U.S.C. § 732(d)(4). The Act also created a General Accounting Office Personnel Appeals Board to hear employees' complaints. This Board has duties and powers similar to those of the Merit Systems Protection Board. 3 1 U.S.C. §§ 751-755. Since October 1, 1980, complaints of GAO employees concerning covered actions have been heard before the Personnel Appeals Board. Under the Act appeal rights have been extended to all GAO employees who complete 1 year of continuous service under a nontemporary appointment, including attorneys and others who were already in the excepted service.

Thus, all GAO employees whether they are in positions that would be considered to be in the competitive or the excepted service in an executive branch agency have access to our Personnel Appeals Board. Because all GAO employees already have appeal rights, we do not believe that GAO employees should be allowed to appeal also to the MSPB. Such an additional appeal right would not only be unnecessary but might also result in inconsistencies or contradictions in the handling of GAO employee cases.

We recommend that paragraph (3) be amended to read:

"(C) an individual in an executive agency in the excepted service (other than an individual under subparagraph (B) or an individual employed by the General Accounting Office) who has completed 2 years of current continuous service in the same or similar positions * * *."

Sincerely yours,

MILTON J. SOCOLAR
(For Comptroller General of the United States).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, exiting law in which no change is proposed is shown in roman):

SECTION 7511 OF TITLE 5, UNITED STATES CODE

[§ 7511. Definitions; application

[(a) For the purpose of this subchapter—

[(1) "employee" means—

[(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

[(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

[(2) "suspension" has the meaning as set forth in section 7501(2) of this title;

[(3) "grade" means a level of classification under a position classification system;

[(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

[(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

[(b) This subchapter does not apply to an employee—

[(1) whose appointment is made by and with the advice and consent of the Senate;

[(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

[(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

[(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

[(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.]

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(1) "employee" means—

(A) an individual in the competitive service—

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

(i) in an Executive agency; or

(ii) in the United States Postal Service or the Postal Rate Commission; and

(C) an individual in the excepted service (other than a preference eligible) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency;

(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

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(b) This subchapter does not apply to an employee—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

(A) the President for a position that the President has excepted from the competitive service;

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund;

(5) who is described in section 8337(h)(1) of this title, relating to technicians in the National Guard;

(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;

(7) whose position is within the Central Intelligence Agency, the General Accounting Office, or the Department of Medicine and Surgery, Veterans' Administration; or

(8) whose position is within the United States Postal Service, the Postal Rate Commission, the Federal Bureau of Investigation, or the National Security Agency, except as provided in subsection (a)(1)(B) of this section.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.

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